IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-229

ANTHONY PACE, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent,

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE PETITIONER, ANTHONY PACE

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CITATIONS

STATUTES

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MEMORANDUM FOR THE PETITIONER,
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The petitioner, Anthony Pace, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on the 12th day of July, 1977, affirming the judgment of conviction from the United States District Court for the Northern District of Ohio, Eastern Division.

OPINION BELOW

The per curiam opinion of the Court of Appeals for the Sixth Circuit, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Northern District of Ohio, Eastern Division.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on the 12th day of July, 1977. This petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under Title 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether a conviction under Title 26 U.S.C. Section 7206(1) for "willfully and knowingly mak[ing] and subscrib[ing]" United States individual income tax returns for the years 1971 and 1972 which the petitioner did not "believe to be true and correct as to every material matter" can be sustained where defendant is kept from introducing evidence tending to prove that there was in fact no tax due and owing for the years in question.

2. Whether the province of the jury was invaded by a government witness who, in responding to numerous purported hypothetical questions incorporating the petitioner's surname, was able to voice his opinion of guilt.

3. Whether comment by the government with respect to failure by the accused to testify constitutes reversible error.

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS

United States Code, Title 26:
Section 7206. Fraud and False Statements.

Any person who--

(1) Declaration under penalties of perjury.--Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

STATEMENT OF THE CASE

On September 17, 1976 a judgment of conviction was centered against Petitioner, Anthony Pace, in the United States District Court for the Northern District of Ohio, Eastern Division, for willfullymaking and subscribing his United States individual income tax returns for the years 1971 (Count I) and 1972 (Count II) which, the government alleged, he did not believe to be true and correct as to every material matter, in violation of Title

26 U.S.C. Section 7206(1). Both counts of the indictment charged that Petitioner had failed to report as income interest he had received from the collection of loans in the amount of approximately $20,458.74 for 1971 (Count I) and approximately $2,688.66 for 1972 (Count II). Additionally, the indictment charged that defendant had received additional unreported income during the times in question. A timely Notice of Appeal to the United States Court of Appeals for the Sixth Circuit was filed, jurisdiction being conferred under Title 28 U.S.C. Section 1291.

At trial, Petitioner testified that he had not reported interest income because he had lost substantial money on various loans. His money lending had thus produced a net loss. If permitted, Petitioner would have presented evidence which would have revealed an overpayment of income tax during the questioned years. However, a Court ruling at a June 4, 1976 pretrial hearing precluded Petitioner from substantiating this claim, excluding from the jury all evidence relative to the computation of whether or not there was a tax due and owing.

During Petitioner's trial certain highly improper and incompetent testimony was admitted, over defense objection, in response to numerous purported hypothetical questions which incorporated Petitioner's surname. This testimony extended over sixty pages of trial transcript. The witness, Revenue Agent Meister, appeared following the testimony of the rest of the government's witnesses. After being duly qualified as an expert in income tax law, the witness explained that he had prepared summary schedules of the exhibits previously introduced. After explaining what was contained on each schedule, the witness was asked hypothetical questions which incorporated Petitioner's surname. The questions concerned whether the monies represented on the schedules were required to be reported on an individual's

income tax return if it were assumed that the monies represented repayments of a loan and interest thereon. The witness was asked to assume that a transfer of funds from the Petitioner to another was a loan and that interest was charged on that loan. The witness was then asked his opinion as to whether Petitioner received interest income from that individual. All the hypotheticals were to material facts which remained to be found by the jury. To give his opinion the witness necessarily had to pass on the credibility of witnesses and weigh the evidence, thus invading the province of the jury.

During final argument, counsel for the government made highly prejudicial comment. The following occurred at T. 25 - T. 26 of the government's closing argument:

> "MR. MICHAELSON: . . . . If the truth would be known, and the people who had control of the evidence that should be presented here, we would know what in fact the loss was from T.F.F.
>
> MR. YELSKY: I will object.
>
> THE COURT: Objection sustained."

The allegation that the accused failed to present certain evidence or to testify, although he did in fact take the stand, violated his Fifth Amendment rights and specifically the rule set forth in Griffin v. California, 380 U.S. 609 (1965), that in a federal criminal trial comment by counsel for the Government with respect to failure by the accused to testify is reversible error.

REASONS FOR GRANTING THE WRIT

ONE: As to the refusal by the Court to accept evidence relating to the computation of whether there was a tax due and owing by Petitioner

the Sixth Circuit has decided an important question of federal law in a way which conflicts with important decisions of other circuits.

In a charge under Title 26 U.S.C. Section 7206(1), the Government is claiming essentially that the Petitioner has made material misstatements in his returns for the years in question. At issue is, assuming such misstatements exist, whether or not they are material. Materiality is an essential element of the crime of making a false statement. United States v. Norris, 300 U.S. 564, 81 L. Ed. 808. (See also, Freidus v. United States, 223 F. 2d 601; Rolland v. United States, 200 F. 2d 678). Furthermore, 26 U.S.C. Section 7206(1) makes materiality an essential ingredient of the offense. The highly penal nature of the statute must be construed as requiring a material falsification. In order then to obtain a conviction under this statute, the alleged false statement must be material to the point of inquiry. In Paritem Singh Poonian v. United States, 294 F. 2d 74 (1961), the Ninth Circuit held that the source of one's income as distinguished from the amount of one's income is not a material matter which can be falsely stated within the meaning of Title 26 U.S.C. Section 7206(1). That Court held:

> "[A]lthough appellant may have intended to falsify, that alone is insufficient to convict, for it is hornbook law that in every crime there must be a joint union of act and intent. Here, there may have been intent. There was no act, because it was legally impossible for appellant to be guilty of having falsified, i.e., understated, income . . ."

In the present situation it was impossible for the Petitioner to falsify as to a material matter since he in fact overpayed his tax. At trial, the Petitioner desired to show that certain deductions

were not taken to which he was legally entitled; that by computing these deductions he would have been able to show that he had in fact overpayed his income tax for the years in question; and, that any misstatements allegedly made were not material since more income tax was paid than owed.

In properly determining this matter, the laws and distinctions peculiar to income tax law must be brought into focus. The purpose of the tax laws was not to prosecute. As was pointed out in the Senate debate on the bill that became the first modern income tax law, as cited in Commissioner v. Tellier, 383 U.S. 687, 691 (1966), "[T]he object of this bill is to tax a man's net income; that is to say, what he has at the end of the year after deducting from his receipts his expenditures or losses. . . . [T]he tax is framed for the purpose of making a man pay upon his net income, his actual profit during the year." The Supreme Court further noted at 691: "We start with the proposition that the federal income tax is a tax on net income, not a sanction against wrongdoing. That principle has been firmly imbedded in the tax statute from the beginning." Here, the misrepresentation for which the government seeks to punish occurred in an environment where tax was in fact overpayed. It is impossible for the Government to prove specific intent and evil motive and purpose in this kind of setting. (Spies v. United States, 317 U.S. 492, 87 L. Ed. 418). As stated in Poonian, supra, "This Court refuses to construe the statute in question so as to permit a taxpayer to be convicted of reporting more taxes than he rightfully owes, . . ."

TWO: As to the invasion of the province of the jury by a government witness who in responding to numerous purported hypothetical questions incorporating Petitioner's surname was able to voice his opinion of guilt, the Sixth Circuit has decided an important question of federal law which has not been passed upon by this Court. All of the hypotheticals involved herein were to material facts

which remained to be found by the jury. In stating his opinion concerning all of these transactions the witness necessarily conveyed the impression that the credibility of all the previous witnesses had been passed upon and all the evidence weighed. The trial court abused its discretion by allowing the government to introduce this lengthy testimony which had a cumulative prejudicial impact and which completely invaded the province of the jury. None of the testimony offered had a legitimate bearing upon the issues. Rather, the testimony drawn in question was an opportunity for the government to offer an opinion as to the guilt of the accused. Courts agree that if there is any conflict between the witnesses as to the material facts on which an expert opinion is sought, or such facts are doubtful and remain to be found by the jury, the expert witness cannot, although he has heard the testimony, be asked to base his opinion on that testimony, because, to reach his conclusion, he would necessarily have to invade the province of the jury and pass on the credibility of witnesses and the weight of the evidence. (31 Am Jur 2d 545).

Under the circumstances set out here admission of the testimony created a substantial danger of undue prejudice Expert testimony particularly courts this danger because of its aura of special reliability and trustworthiness. United States v. Amaral, 488 F. 2d 1148, 1152 (9th Cir. 1973), and the Sixth Circuit recently recognized the "outcome determinative impact of 'opinion evidence clothed with the weight of expertise', . . ." United States v. Green, 6th Cir. No. 76-1461.

THREE: As to comment by the government with respect to failure by the accused to testify, the Sixth Circuit has decided an important question of constitutional law in a way which conflicted with important decisions of the Supreme Court. The Fifth Amendment to the Constitution of the United States provides the accused in a criminal trial

shall not be compelled to be a witness against himself and this includes both the right not to testify and the right that such failure to testify shall not be subject of comment by the attorney for the prosecution, Wilson v. United States, 149 U.S. 60, 13 S. Ct. 765, 37 L. Ed. 650 (1893). Furthermore, the United States Supreme Court, in Griffin v. United States, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), held that the Fifth Amendment, ". . . in its direct application to the Federal Government . , , forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." 380 U.S. at 614.

In arguing that the accused failed to present certain evidence or to testify the government violated the petitioner's Fifth Amendment rights, specifically the rule set forth in Griffin v. California, supra. Griffin further holds that whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may not be commented upon by the court and by counsel, and may not be considered by the court or the jury. Thus it is a violation of the Defendant's privilege against self-incrimination to improperly, such as by unwarranted comment of the Court, prosecution, or jury, place him in the position where he must testify in order to avoid any adverse inference that may arise from his failure to do so. (21 Am. Jur. 2d 383, "Criminal Law" Section 356.)

Moreover, an accused cannot be compelled to produce private papers or documents that may contain incriminating evidence. It is the general view that it is improper for the prosecuting attorney, or the Court, in the presence of the jury to call upon the Defendant or his counsel to produce a document as being in his possession. (21 Am. Jur. 2d 382, "Criminal Law" Section 355.)

Finally, that an accused is entitled, on re-

quest, to have the Court instruct the jury that it is to draw no inference from his failure to take the stand and testify (21 Am. Jur. 2d 383, "Criminal Law" Section 356) and that such instruction was forthcoming is no consolation once the damage has occurred.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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August 9, 1977

APPENDIX

APPENDIX A

NO. 77-5001

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA :

Plaintiff-Appellee :

v. : ORDER

ANTHONY PACE :

Defendant-Appellant :

- - - - - -

Before: CELEBREZZE and PECK, Circuit Judges, and FREEMAN*, Senior District Judge.

Defendant-appellant was convicted following a jury trial of having wilfully and knowingly made and subscribed his income tax returns for the years 1971 and 1972, without believing them to be true as to every material matter contained therein, in violation of Section 7206(1) of the Internal Revenue Code.

The Court, after a review of the transcript of the testimony of the witness concerned, concludes that an Internal Revenue agent whose testimony appellant challenges was properly qualified as an expert, and while this Court does not condone

*Honorable Robert M. Freeman, United States District Court for the Eastern District of Michigan, Sitting by designation.

the practice followed by appellee's attorney in incorporating the appellant's surname in what purported to be hypothetical questions, it is concluded that no prejudice resulted therefrom to the appellant, and that the subject areas in which opinion testimony was received were appropriate areas for expert testimony. It being further concluded that whatever prejudice might have otherwise resulted from an improper statement made by appellee's attorney in his final argument to the jury was obviated by the trial judge's immediate admonition, and that the district court did not err in excluding evidence which might have shown the overpayment of taxes for the years in question, since such evidence would have been irrelevant to the issues presented. Accordingly,

IT IS ORDERED that the judgment of the district court be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk of Court

Filed: July 12, 1977

No. 77-229

In the Supreme Court of the United States

OCTOBER TERM, 1977

ANTHONY PACE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

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ANTHONY PACE, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted on two counts of filing false income tax returns, in violation of 26 U.S.C. 7206(1). The trial court sentenced petitioner to concurrent terms of three years' imprisonment on each count (the first six months of which were to be served in a jail-type institution, with the remainder to be waived in favor of probation) and fined him $5,000 on each count. The court of appeals affirmed (Pet. App. A).

The evidence adduced at trial showed that petitioner was engaged in the business of lending money and had not reported income from various loans and business ventures in 1971 and 1972. The majority of petitioner's loans were made to individuals at rates of interest that, in

some instances, were as high as 120 percent per year (Tr. Vol. 1, p. 110). Petitioner did not report any interest income from his money-lending business on his 1971 or 1972 tax returns. In 1971, petitioner loaned a substantial amount of money to a small corporation named T.F.F. (Tr. Vol. 3, p. 99). Upon the departure of the president of T.F.F., petitioner took over its operations and diverted most of its receipts to his own uses (Tr. Vol. 8, p. 81). In July 1971, petitioner incorporated Custom Remodelers, Inc., which moved into the offices formerly occupied by T.F.F. and succeded to its business. At that time, T.F.F. ceased to do business (Tr. Vol. 8, pp. 16, 93-94). Petitioner did not report as income on his income tax return any interest on the T.F.F. loan, any of the funds diverted from T.F.F., or any withdrawals of money from Custom Remodelers (Tr. Vol. 7, pp. 95-96; Tr. Vol. 8, p. 121).

In defense, petitioner testified that he had not reported any income from these transactions because his money-lending business had produced an overall loss, and he believed he did not have to report a loss on his return. Petitioner further testified that he believed he received no income from Custom Remodelers since the only money he received from that corporation he believed to be partial repayment of a loan (Tr. Vol. 7, pp. 95-96; Tr. Vol. 8, pp. 16-17).

1. Petitioner argues (Pet. 5-6) that the district court erred in refusing to permit him to introduce evidence showing he had overpaid his income taxes. But the courts of appeals have uniformly held that in a prosecution for filing a false tax return, the crime is complete with the willful filing of a return which omits items of income. *United States* v. *Ballard*, 535 F.2d 400, 404-405 (C.A. 8); *United States* v. *DiVarco*, 484 F.2d 670, 673 (C.A.

7); *United States* v. *Null*, 415 F.2d 1178 (C.A. 4); *Siravo* v. *United States*, 377 F. 2d 469 (C.A. 1).[1]

At all events, the district court's ruling in no way prejudiced petitioner. In concluding that petitioner could not introduce evidence relating to the computation of his tax liability, the court noted (R. A78-A79)[2] that petitioner could present any aspect of his financial condition that bore on the element of specific intent. Indeed, petitioner testified (Tr. Vol. 7, pp. 95-96) that since his money-lending operations had produced a net loss, he believed he did not have to report the income and deductions from that business on his tax returns. Petitioner's claim therefore was put before the jury for its consideration.[3]

2. Petitioner also contends (Pet. 7-8) that the use of a government expert witness and summary schedules was cumulative, prejudicial, and invaded the province of the jury. This Court, however, has approved the government's use of such expert witnesses and summary schedules as

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[1] *Paritem Singh Poonian* v. *United States*, 294 F. 2d 74 (C.A. 9), upon which petitioner relies (Pet. 6, 7), is distinguishable. There, the taxpayer was charged with filing a false return because he failed to report income he believed was his, but which was, in fact, the income of another person. Under those circumstances, the failure to report such income did not result in a return that was false as to a material matter. Here, on the other hand, petitioner was prosecuted for failing to report income which he had received and which he should have reported.

[2] "R." references are to the record appendix attached to petitioner's brief in the court of appeals.

[3] Petitioner further argues (Pet. 7-8) that the prosecutor's use of petitioner's name in hypothetical questions posed to the government's expert witness was prejudicial. Petitioner did not object to the use of his name in the hypothetical questions, however, and the court of appeals correctly concluded that in any event there was no evidence of any prejudice resulting from this practice (Pet. App. A).

part of the proof in tax cases. *Mackey* v. *United States*, 401 U.S. 667; *Holland* v. *United States*, 348 U.S. 121; *United States* v. *Johnson*, 319 U.S. 503. Here, the use of an expert witness was particularly appropriate to make a showing that items omitted from the tax return were required to be reported on the return. See *United States* v. *Amaral*, 488 F. 2d 1148, 1152 (C.A. 9). As the court of appeals noted (Pet. App. A, p. 2), the expert's testimony was restricted to subject matters which were appropriate for the use of such testimony. See *United States* v. *Green*, 548 F. 2d 1261 (C.A. 6).

The testimony was a summary of the previously presented evidence and an explanation as to how certain items should be reported on a tax return if certain facts in evidence were assumed to be true. Whether those facts were true remained a question for the jury to decide.[4] Thus, the expert's testimony did not invade the province of the jury.

3. Finally, petitioner argues (Pet. 8-10) that the prosecutor's statements during closing argument improperly commented on his refusal to testify. But the comment in question was addressed to disputed evidence, not to petitioner's refusal to testify.

a. In 1970, Louis Kerr owed petitioner a substantial amount of money. At that time Kerr and his T.F.F. Construction Company gave petitioner a note for $270,000

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[4]At the time this testimony was given, the court instructed the jury (Tr. Vol. 6, p. 66):

> * * * any question put to such [an expert] witness and calling for an opinion must be based on assumptions of fact contained in the evidence.
>
> It will be for the jury always to determine whether the assumptions of fact which are put into the question indeed are borne out by the evidence, and whether they are found to be true.

($143,000 principal and the remainder interest), payable at the rate of $1,035 per week. In early 1971, Kerr borrowed an additional $40,000 from petitioner. In April 1971, Kerr began serving a prison term (Tr. Vol. 3, pp. 97-99; Tr. Vol. 8, pp. 7-9). Petitioner then took over the day-to-day operations of T.F.F. Petitioner testified on direct examination that he had operated T.F.F. for a few months and that he sold its vehicles (Tr. Vol. 8, p. 11). He stated that when T.F.F. received payments on contracts, he did not record those receipts on T.F.F.'s books but instead applied them to the T.F.F. obligations to himself (Tr. Vol. 8, p. 81). The substance of his defense was that his money-lending operations lost money because T.F.F. only paid approximately $24,000 on the $143,000 obligation. Petitioner claimed that he sustained an $118,000 loss on that loan that exceeded the income from loans he made to other individuals (Tr. Vol. 7, pp. 95-96, 162-163).

In July 1971, petitioner incorporated Custom Remodelers, Inc., to take over the unfinished jobs of T.F.F., and he loaned Custom $20,000 to start business (Tr. Vol. 8, p. 16). On cross-examination, petitioner testified that he had invested $20,000 to start Custom (Tr. Vol. 8, p. 104), and that Custom had occupied the T.F.F. offices and had started business with T.F.F.'s assets (Tr. Vol. 8, pp. 93-94). T.F.F. was never paid nor were its creditors—it "just stopped" doing business (Tr. Vol. 8, p. 94). Previously, the government had showed Custom had received a check for $4,612.32 that petitioner had deposited in his personal checking account and had not reported on his income tax return. Petitioner claimed that this amount was the only money he had received from Custom and that he had treated it as part repayment on the loan (*e.g.*, Tr. Vol. 8, pp. 112-113).

During petitioner's cross-examination, the government introduced documentary evidence showing that petitioner had received, at different times, $2,000 from Custom (Tr. Vol. 8, pp. 115-119), which he deposited in the account of another of his wholly-owned corporations, a $9,000 check made out to Custom, which he deposited in his personal account (Tr. Vol. 8, pp. 119-120), and a $16,500 check to Custom, which he deposited in his personal savings account (Tr. Vol. 8, pp. 120-121). On redirect examination petitioner testified that the $16,500 was returned to Custom a "day or two later" in amounts of $14,000, $650, and some other items (Tr. Vol. 8, p. 159).

b. In addressing this evidence in closing argument, government counsel argued (Tr. of August 6, 1976, "Excerpt," pp. 25-26):

> That business [Custom] was T.F.F. continued. That is all it was, and this was a way to get out from paying the creditors of T.F.F. and taking over the assets of T.F.F.
>
> If the truth would be known, and the people who had control of the evidence that should be presented here, we would know what in fact the loss was from T.F.F.
>
> Mr. YELSKY: I will object.
>
> THE COURT: Objection sustained. The Jury will understand that argument goes beyond the evidence, and I will tell the Government to absolutely refrain from any further argument on that point.
>
> MR. MICHAELSON: Okay. Yes, sir. We haven't gotten not even a hint that Custom Remodelers had any investment whatsoever. But we know that that 4600 bucks was taken out of there.

> The reason it was taken out of there was because nobody would ever know. It was endorsed and just slipped aside to a personal bank account. That is exactly what happened to it.

Contrary to petitioner's assertions, the prosecutor's statement did not comment on his failure to testify. Indeed, petitioner testified in his own defense for almost two days (Tr. Vol. 7, pp. 85-163, and Vol. 8, pp. 7-163). The purpose of the prosecutor's statement was to refute petitioner's assertion that he had sustained a loss from Custom (see, *e.g.*, Tr. Vol. 6, pp. 58-64). At all events, the district court's immediate admonition to the jury that the prosecutor's statement was not based on facts in the record (R. A76), that statements of counsel are not evidence (Tr. Vol. 8, p. 168), and that "the law does not impose upon an accused the duty of producing any evidence or to prove his innocence" (Tr. Vol. 8, p. 174) eliminated any prejudice arising from the remark.

For the reasons stated, it is repectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

OCTOBER 1977.

DOJ-1977-10